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Attorneys for Movants and Plaintiffs,
LORI M. BROOKS and STEVEN BROOKS

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION

In Re:	)	Case No. 17-13797
	)	DC No. KBK-1
TULARE LOCAL HEALTH CARE DISTRICT	)	Chapter 9
dba TULARE REGIONAL MEDICAL CENTER,)	
	)	Tulare County Superior Court Case No.
Debtor.	)	VCU266862
LORI M. BROOKS and STEVEN BROOKS,	)	AMENDED DECLARATION OF KEVIN B.
	)	KALAJIAN
Plaintiffs,	)	IN SUPPORT OF MOTION FOR RELIEF
	)	FROM AUTOMATIC STAY
v.)	
	)	Hearing:
TULARE LOCAL HEALTH CARE DISTRICT	)	Date : March 1, 2018
dba TULARE REGIONAL MEDICAL CENTER;	)	Time : 9:30 a.m.
RICHARD FIGHTLIN, M.D.; ARTHUR WONG,	)	Dept. : B
M.D.; and DOES 1 to 10, inclusive,	)	Courtroom : 13
)	
Defendants.)	

I, Kevin B. Kalajian, declare:

1. I am an attorney licensed to practice before all courts in the State of California. I am an attorney in the law firm of Baradat & Paboojian, Inc., attorneys of record for Movants and Plaintiffs, LORI M. BROOKS and STEVEN BROOKS (hereinafter “Movants”). I have personal knowledge of the following facts in this matter, except as to those matters which are stated on information and belief and as to those matters I believe them to be true.

2. I have personal knowledge of the matters stated herein, and if called upon to testify, I could competently testify thereto.

3. Attached hereto as **Exhibit "A"** is a true and correct copy of Movants' Complaint for Medical Malpractice filed on September 12, 2016, in the Superior Court of California, County of Tulare, Case No. VCU266862.

4. Attached hereto as **Exhibit "B"** is a true and correct copy of Defendant TULARE REGIONAL MEDICAL CENTER's "Certificate of Participation" in the BETA Risk Management Authority insurance policy (Certificate No. HCL-16-361) in effect from July 1, 2016 to July 1, 2017. This is a claims-made policy.

5. At the time Defendant TULARE REGIONAL MEDICAL CENTER filed its voluntary petition under chapter 9, it had a dispositive Motion for Summary Judgment or, Alternatively, for Summary Adjudication pending. A true and correct copy of Defendant TULARE REGIONAL MEDICAL CENTER's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment or, Alternatively, for Summary Adjudication is attached hereto as **Exhibit "C."**

6. On October 13, 2017, Movants filed a Notice of Non-Opposition to Defendant TULARE REGIONAL MEDICAL CENTER's Motion for Summary Judgment or, alternatively, for Summary Adjudication with the Tulare County Superior Court. The hearing on Defendant TULARE REGIONAL MEDICAL CENTER's motion was vacated shortly thereafter. A true and correct copy of Movants' Notice of Non-Opposition is attached hereto as **Exhibit "D."**

7. The Action does not seek to enforce any judgment obtained against the Debtor personally or the bankruptcy estate itself. Rather, Movant seeks relief from the stay so Defendant TULARE REGIONAL MEDICAL CENTER can file another dispositive motion and get out of the case, leaving Movants to pursue their claims against the other Defendants.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except as to those matters which are stated on information and belief, and as to those matters I believe them to be true. Executed on February 13, 2018, at Fresno, California.

By: 
KEVIN B. KALAJIAN

EXHIBIT A

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Daniel R. Baradat, 068651 Baradat & Paboojian, Inc. 720 W. Alluvial Avenue Fresno, California 93711 TELEPHONE NO: (559) 431-5366 FAX NO. (Optional): (559) 431-1702 E-MAIL ADDRESS (Optional): drb@bplaw-inc.com ATTORNEY FOR (Name): LORI M. BROOKS, STEVEN BROOKS		324 PLD-PI-001 FOR COURT USE ONLY FILED TULARE COUNTY SUPERIOR COURT VISALIA DIVISION SEP 12 2016 LARAYNE CLEEK, CLERK BY: Sharon K. Baker
SUPERIOR COURT OF CALIFORNIA, COUNTY OF TULARE STREET ADDRESS: 221 S. Mooney Blvd. MAILING ADDRESS: CITY AND ZIP CODE: Visalia, California 93291 BRANCH NAME:		Assigned to Judicial Officer: <u>David C. Mathias</u> For All Purposes
PLAINTIFF: LORI M. BROOKS and STEVEN BROOKS DEFENDANT: TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER; RICHARD FIGHTLIN, M.D.; ARTHUR WONG, M.D.; and <input checked="" type="checkbox"/> DOES 1 TO 20		
COMPLAINT—Personal Injury, Property Damage, Wrongful Death <input type="checkbox"/> AMENDED (Number): Type (check all that apply): <input type="checkbox"/> MOTOR VEHICLE <input checked="" type="checkbox"/> OTHER (specify): Medical Malpractice <input type="checkbox"/> Property Damage <input type="checkbox"/> Wrongful Death <input checked="" type="checkbox"/> Personal Injury <input type="checkbox"/> Other Damages (specify): Jurisdiction (check all that apply): <input type="checkbox"/> ACTION IS A LIMITED CIVIL CASE Amount demanded <input type="checkbox"/> does not exceed \$10,000 <input type="checkbox"/> exceeds \$10,000, but does not exceed \$25,000 <input checked="" type="checkbox"/> ACTION IS AN UNLIMITED CIVIL CASE (exceeds \$25,000) <input type="checkbox"/> ACTION IS RECLASSIFIED by this amended complaint <input type="checkbox"/> from limited to unlimited <input type="checkbox"/> from unlimited to limited		
		CASE NUMBER: VC 266862

1. Plaintiff (name or names): LORI M. BROOKS and STEVEN BROOKS

alleges causes of action against defendant (name or names): TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER; RICHARD FIGHTLIN, M.D.; ARTHUR WONG, M.D.; and DOES 1-20

2. This pleading, including attachments and exhibits, consists of the following number of pages: 4

3. Each plaintiff named above is a competent adult

a. ☐ except plaintiff (name):

- (1) ☐ a corporation qualified to do business in California
- (2) ☐ an unincorporated entity (describe):
- (3) ☐ a public entity (describe):
- (4) ☐ a minor ☐ an adult
 - (a) ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
 - (b) ☐ other (specify):
- (5) ☐ other (specify):

b. ☐ except plaintiff (name):

- (1) ☐ a corporation qualified to do business in California
- (2) ☐ an unincorporated entity (describe):
- (3) ☐ a public entity (describe):
- (4) ☐ a minor ☐ an adult
 - (a) ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
 - (b) ☐ other (specify):
- (5) ☐ other (specify):

☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3.

SHORT TITLE: BROOKS v. TULARE	PLD-PI-001
CASE NUMBER	

4. ☐ Plaintiff (name):
is doing business under the fictitious name (specify):

and has complied with the fictitious business name laws.
5. Each defendant named above is a natural person
- a. ☒ except defendant (name): TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER
- (1) ☐ a business organization, form unknown
(2) ☐ a corporation
(3) ☐ an unincorporated entity (describe):

(4) ☒ a public entity (describe): hospital district
(5) ☐ other (specify):
- c. ☐ except defendant (name):
- (1) ☐ a business organization, form unknown
(2) ☐ a corporation
(3) ☐ an unincorporated entity (describe):

(4) ☐ a public entity (describe):
(5) ☐ other (specify):
- b. ☐ except defendant (name):
- (1) ☐ a business organization, form unknown
(2) ☐ a corporation
(3) ☐ an unincorporated entity (describe):

(4) ☐ a public entity (describe):
(5) ☐ other (specify):
- d. ☐ except defendant (name):
- (1) ☐ a business organization, form unknown
(2) ☐ a corporation
(3) ☐ an unincorporated entity (describe):

(4) ☐ a public entity (describe):
(5) ☐ other (specify):
- ☐ Information about additional defendants who are not natural persons is contained in Attachment 5.
6. The true names of defendants sued as Does are unknown to plaintiff.
- a. ☒ Doe defendants (specify Doe numbers): 1-10 were the agents or employees of other named defendants and acted within the scope of that agency or employment.
- b. ☒ Doe defendants (specify Doe numbers): 11-20 are persons whose capacities are unknown to plaintiff.
7. ☐ Defendants who are joined under Code of Civil Procedure section 382 are (names):
8. This court is the proper court because
- a. ☒ at least one defendant now resides in its jurisdictional area.
b. ☒ the principal place of business of a defendant corporation or unincorporated association is in its jurisdictional area.
c. ☒ injury to person or damage to personal property occurred in its jurisdictional area.
d. ☐ other (specify):
9. ☒ Plaintiff is required to comply with a claims statute, and
- a. ☒ has complied with applicable claims statutes, or
b. ☐ is excused from complying because (specify):

SHORT TITLE: BROOKS v. TULARE

PLD-PI-001

CASE NUMBER

10. The following causes of action are attached and the statements above apply to each (each complaint must have one or more causes of action attached):

- a. ☐ Motor Vehicle
- b. ☒ General Negligence
- c. ☐ Intentional Tort
- d. ☐ Products Liability
- e. ☐ Premises Liability
- f. ☐ Other (specify):

11. Plaintiff has suffered

- a. ☒ wage loss
- b. ☐ loss of use of property
- c. ☒ hospital and medical expenses
- d. ☒ general damage
- e. ☐ property damage
- f. ☒ loss of earning capacity
- g. ☒ other damage (specify): Loss of consortium and negligent infliction of emotional distress damages suffered by Steven Brooks, husband of Lori M. Brooks

12. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are

- a. ☐ listed in Attachment 12.
- b. ☐ as follows:

13. The relief sought in this complaint is within the jurisdiction of this court.

14. Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for

- a. (1) ☒ compensatory damages
- (2) ☐ punitive damages

The amount of damages is (in cases for personal injury or wrongful death, you must check (1)):

- (1) ☒ according to proof
- (2) ☐ in the amount of: \$

15. ☒ The paragraphs of this complaint alleged on information and belief are as follows (specify paragraph numbers):
Checked paragraphs 1-14 and General Negligence (Medical Malpractice) Cause of Action.

Date: September 6, 2016

Daniel R. Baradat

(TYPE OR PRINT NAME)

(SIGNATURE OF PLAINTIFF OR ATTORNEY)

SHORT TITLE: BROOKS v. TULARE	PLD-PI-001(2)
CASE NUMBER	

FIRST (number) CAUSE OF ACTION—General Negligence

Page 4

ATTACHMENT TO ☒ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

GN-1. Plaintiff (name): LORI M. BROOKS and STEVEN BROOKS

alleges that defendant (name): TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER; RICHARD FIGHTLIN, M.D.; ARTHUR WONG, M.D. and

☒ Does 1 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant negligently caused the damage to plaintiff

on (date): January 28, 2016 through February 12, 2016

at (place): Tulare Regional Medical Center, Tulare, CA.

(description of reasons for liability):

I.

Defendants, and each of them, were physicians, hospitals and/or health care providers, duly licensed to practice medicine in the State of California, each holding himself out to possess that degree of skill, ability and learning common to medical practitioners in the community.

II.

That on or about January 28, 2016, and at all times thereafter, Plaintiff, Lori M. Brooks, consulted with Defendants, and each of them, for the purpose of obtaining a diagnosis and treatment of an injury, condition and illness, and employed said Defendants, and each of them, to care for and treat Plaintiff, and to do those things necessary and proper in said care and treatment. That said Defendants, and each of them, undertook said employment and agreed to do all things reasonable, proper and necessary in connection therewith, and said Defendants, and each of them, thereafter entered into such employment, individually, and by and through their employers, employees, servants and agents.

III.

Pursuant to said agreement and on or about January 28, 2016, Plaintiff, Lori M. Brooks, was examined and underwent a ureteroscopy, laser lithotripsy, stent placement, and other diagnostic and therapeutic procedures, and thereafter, continued to be treated and cared for by Defendants, and each of them, until on or about March 4, 2016. At all times mention, Defendants, and each of them, failed to properly treat, monitor, diagnose or refer Lori M. Brooks. Further, Tulare Local Health Care District dba Tulare Regional Medical Center was negligent in granting staffing privileges to Richard Fightlin, M.D.

IV.

That at all times mentioned herein, Defendants, and each of them, failed to use reasonable care or skill common to medical practitioners in the community and further failed to use reasonable care in the diagnosis and treatment of said condition, illness and injury, and at all times, each of said Defendants was acting as the agent of each other Defendant.

V.

Steven Brooks is the husband of Lori M. Brooks. During her hospital stay, Steven Brooks witnessed negligent events and has suffered a negligent infliction of emotional distress as well as loss of consortium damages.

EXHIBIT B

BETA Risk Management Authority ("BETARMA")
A Public Entity

CERTIFICATE OF PARTICIPATION
HEALTHCARE ENTITY COMPREHENSIVE LIABILITY COVERAGE CONTRACT

PRODUCER: Barney & Barney, LLC Attn: William Buchanan

CERTIFICATE NUMBER:
HCL-16-361

ITEM 1: NAMED MEMBER: Tulare Local Healthcare District 869 Cherry Street, Tulare, CA 93274
ITEM 2: SUBSIDIARIES: Tulare Family X-Ray, Tulare Physical Therapy, Tulare District Health Care System Foundation, Tulare District Health Care System Lab Drawing Station, Tulare Surgical Services, Tulare Hospital Foundation, Tulare Hospital Auxiliary
ITEM 3: CONTRACT PERIOD: (a) Effective Date: 7/1/2016 (b) Expiration Date: 7/1/2017 at 12:01 a.m. local time for all dates at the address in Item 1
ITEM 4: RETROACTIVE DATE FOR PROFESSIONAL LIABILITY: 7/1/1985 at 12:01 a.m. local time for all dates at the address in Item 1
ITEM 5: COVERAGE AND LIMITS OF LIABILITY PROVIDED: \$10,000,000 per Claim (except as provided by Amendment) \$20,000,000 in the Aggregate (Coverages provided are indicated with an "X") Professional Liability <input checked="" type="checkbox"/> Healthcare Entity Professional Liability - Claims Made General Liability <input checked="" type="checkbox"/> Bodily Injury and Property Damage Liability - Occurrence <input checked="" type="checkbox"/> Personal Injury, Advertising Injury and Discrimination Liability - Occurrence <input checked="" type="checkbox"/> Employee Benefits Liability - Occurrence
ITEM 6: DEDUCTIBLE: See Section 7.9.B \$100,000 Indemnity Only
ITEM 7: CONTRIBUTION: See Section 7.9.A
ITEM 8: CONTRACT AND AMENDMENT FORMS ATTACHED AT ISSUANCE: HCL (07/15) 120, 130, 131, 134, 145, 170, 203, 210, 217, 237, 262, 272, 273, 294
ITEM 9: NOTICE REQUIRED TO BE GIVEN TO BETARMA MUST BE ADDRESSED TO: BETA Risk Management Authority 1443 Danville Boulevard Alamo, CA 94507

This Certificate of Participation, the Application(s) and accompanying documents, and the Coverage Contract with Amendments shall constitute the Contract between BETARMA and the Members.



Authorized Representative of BETARMA

EXHIBIT C

Government Entity Tulare Regional Medical Center
No Filing Fee Required [Gov't. Code § 6103]

Richard S. Salinas #154959
Stacy R. Lucas #243555
WEISS-SALINAS LAW GROUP, INC.
7108 North Fresno Street, Suite 250
Fresno, California 93720
Telephone: (559) 438-2080
Facsimile: (559) 438-8363
rsalinas@weiss-salinas.com

Mtn. Date: 9/21/17
L/D Opp.: 9/27/17
L/D Reply: 9/28/17

Attorneys for Defendant TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF TULARE

LORI M. BROOKS and STEVEN BROOKS

Plaintiffs,

vs.

TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER; RICHARD FIGHTLIN, M.D.; ARTHUR WONG, M.D.; and DOES 1 through 20,

Defendants.

Case No. VCU266862

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT TULARE REGIONAL MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

DATE: September 21, 2017
TIME: 8:30 a.m.
DEPT: 2

Action Filed: September 12, 2016
Trial Date: October 23, 2017

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

II. PLAINTIFF LORI BROOKS' PERTINENT MEDICAL COURSE..... 3

III. LAW AND ARGUMENT 6

 A. Summary Judgment Is Properly Granted Where No Triable Issue Exists As To Any
 Material Fact And The Defendant Is Entitled to Judgment As A Matter Of Law..... 6

 B. The Declarations Of Dr. Comiter, Nurse Pitts, and Dr. Leeson Provides The Requisite
 Expert Testimony To Support Defendant's Motion. 7

 1. Dr. Comiter, Nurse Pitts, and Dr. Leeson Opined that Defendant TRMC met the
 applicable standard of care, and, therefore, Defendant TRMC is entitled to Summary
 Judgment..... 7

 2. It is Undisputed that No Act or Omission by the Nurses or Non-Physician Staff was a
 Substantial Factor in Causing Plaintiff's Alleged Harm..... 10

 3. Plaintiff Steven Brooks' Cause of Action for Negligent Inflictin of Emotional Distress is
 Without Merit..... 11

IV. CONCLUSION..... 12

CASES

Bardessono v. Michels (1970) 3 Cal.3d 780, 788. 8

Blain v. Doctor’s Co. (1990) 222 Cal.App. 3d 1048, 1067. 7

Bromme v. Pavitt (1992) 5 Cal.App.4th 1487, 1489. 10

Burgess v. Superior Court (1992) 2 Cal.4th 1064, 1081. 8

Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992, 1001. 7,8

Jambazian v. Borden (1994) 25 Cal.App.4th 836, 844. 8

Jones v. Ortho Pharmaceutical Corporation (1985) 163 Cal.App.3d 396, 403. 10

Lawless v. Calaway (1944) 24 Cal.2d 81, 90. 8

Luders v. Pummer (1957) 152 Cal.App.2d 276, 279-280. 6

Mayes v. Bryan (2006) 139 Cal.App. 4th 1075, 1093; CACI VF-500. 10

Munro v. Regents of University of California (1989) 215 Cal.App.3d 977, 984-985. 7,8

Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal.4th 965, 984. 12

Simmons v. West Covina (1989) 212 Cal.App.3d 696, 702. 10

Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1044-145. 12

Thing v. La Chusa (1989) 48 Cal.3d 644. 11

Williams v. Wraxall (1995) 33 Cal.App.4th 120, 123. 10

STATUTES

Code of Civ. Procedure § 437c. 6

Code Civ. Proc. §437c(o)(1) 6,10

1 Defendant TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL
2 MEDICAL CENTER ("TRMC") submits the following Memorandum of Points and Authorities
3 in support of its Motion for Summary Judgment, or, in the alternative, Summary Adjudication as
4 to Plaintiff LORI M. BROOKS and STEVEN BROOKS' ("Plaintiffs") Complaint for Medical
5 Malpractice.

6 **I. STATEMENT OF THE CASE**

7 Plaintiffs filed their Complaint with this Court on September 12, 2016. [Defendant's
8 Separate Statement of Undisputed Material Facts ("SUMF") No. 1. [A true and correct copy of
9 Plaintiff's Complaint is included with Defendant's Statement of Evidence ("SOE") at Tab 1 as
10 Exhibit ("Ex.") A to the Declaration of Stacy R. Lucas ("Lucas Decl.").] Defendant timely filed
11 its Answer to Plaintiffs' Complaint on November 9, 2016, denying each and every allegation and
12 asserting affirmative defenses. [SUMF No. 2. A true and correct copy of Defendant's Answer is
13 included with Defendant's SOE at Tab 1 as Ex. B.]

14 This case arises from Plaintiff Lori Brooks January 28, 2016 admission to TRMC for the
15 removal of kidney stones, during which she suffered complications. Plaintiffs allege that
16 Defendants "failed to use reasonable care or skill common to medical practitioners in the
17 community and further failed to use reasonable care in the diagnosis and treatment of said
18 condition, illness and injury...." (Plaintiff's Complaint at Pg. 4, ¶ 4, SOE, Tab 1, Lucas Dec. at
19 Ex. A.) Plaintiffs also allege that Defendant TRMC "was negligent in granting staffing
20 privileges to Richard Fightlin, M.D." (Plaintiff's Complaint at Pg. 4, ¶ 3.)

21 In support of its motion, Defendant submits the Expert Witness Declarations of Craig V.
22 Comiter, M.D. ("Dr. Comiter"), Amber Pitts, R.N. (Nurse Pitts), and Peter Leeson, D.O. (Dr.
23 Leeson). Dr. Comiter is a Clinical Professor of Medicine at the University of California, Los
24 Angeles. Dr. Comiter has extensive experience in urology. Based on his education, training and
25 professional experience, coupled with his review and analysis of Ms. Brooks' pertinent medical
26 documents, Dr. Comiter is qualified to render expert opinions as to whether Defendant TRMC
27 met the applicable standard of care in providing medical services to Ms. Brooks. [SUMF No. 3.]
28 The factual and medical bases for Dr. Comiter's opinions are set forth in detail in his

1 Declaration. Ms. Brooks' medical records along with the respective Affidavits of the Custodians
2 of Records are attached as Ex. D to the SOE. These medical records support the pertinent
3 medical chronology as determined by Dr. Comiter and further support Dr. Comiter's opinions
4 discussed below.

5 Nurse Pitts has extensive experience in nursing, specifically in the hospital and operating
6 room setting, including Neurosurgery, General, ENT, Plastics, Orthopedics, Urology, GYN,
7 Liver and Kidney transplants, Vascular, and Thoracic with emphasis and specialty in Cardiac
8 Surgery. She is employed as a Clinical RN II in the Main Operating Room of Stanford
9 University Hospital. She is a member of the Stanford Practice Council, emphasizing
10 development and analysis of Stanford OR nursing practice in accordance with best practice
11 research and AORN guidelines.

12 Based on Nurse Pitts' education, training and professional experience, coupled with her
13 review and analysis of Ms. Brooks' pertinent medical documents, Nurse Pitts is qualified to
14 render expert opinions as to whether Defendant TRMC met the applicable standard of care in
15 providing medical services to Ms. Brooks. [SUMF No. 4.] The factual and medical bases for
16 Nurse Pitts' opinions are set forth in detail in her Declaration. Ms. Brooks' medical records
17 along with the respective Affidavits of the Custodians of Records are attached as Ex. D to the
18 SOE. These medical records support the pertinent medical chronology as determined by Nurse
19 Pitts and further support Nurse Pitts' opinions discussed below.

20 Dr. Leeson has extensive experience as a healthcare consultant. He has extensive
21 experience in developing credentialing and privileging policies. He is currently a healthcare
22 consultant for the County of San Bernardino at the Arrowhead Regional Medical Center, a 500-
23 bed acute care hospital with a 60-bed inpatient psychiatry and Level II Trauma Center located in
24 Southern California. He is responsible for advising the hospital on credentialing and privileges.

25 Among their other conclusions, Dr. Comiter and Nurse Pitts have rendered key expert
26 opinions in their Declarations that support this motion. Dr. Comiter and Nurse Pitts state that
27 Defendant TRMC met the standard of care and there is nothing in the medical records that
28 indicated that any of the nurses or non-physician staff at TRMC violated the applicable standard

1 of care. [SUMF Nos. 20, 22.] Dr. Leeson has also offered the key expert opinion that TRMC
2 did not violate the standard of care by providing privileges to Dr. Fightlin. [SUMF No. 28.]
3 Accordingly, unless Plaintiff submits expert opinion testimony to the contrary, Defendant is
4 entitled to summary judgment in its favor as a matter of law.

5 **II. PLAINTIFF LORI BROOKS' PERTINENT MEDICAL COURSE**

6 Based on their education, training and experience and on his review of Ms. Brooks'
7 relevant medical records, reports and imaging studies, Dr. Comiter and Nurse Pitts have
8 determined the pertinent factual chronology as it pertains to Ms. Brooks' medical course to be as
9 follows:

10 Ms. Brooks was admitted to TRMC on January 28, 2016 for a planned left transureteral
11 lithotripsy and stone manipulation (breaking up and removing kidney stones.) She had a history
12 of kidney stones, chronic pain with methadone use, intestinal stricture, stomach and bowel
13 problems, gallbladder problems, rectal problems, and gastric bypass.

14 The stone to be removed was large, and the procedure to break it up was very difficult.
15 The procedure was complicated by the development of profound hyponatremia and laceration of
16 the left kidney. While in the recovery room, Ms. Brooks decompensated, requiring emergency
17 re-intubation. Ms. Brooks was also found to have severe neurologic changes. She was
18 emergently re-intubated in the recovery room. She suffered from bradycardia requiring two
19 rounds of atropine.

20 Ms. Brooks was then transferred to the intensive care unit (ICU) where she was found to
21 have profound electrolyte disorders, which were corrected. Ms. Brooks had acute respiratory
22 failure and developed acute renal failure. Her initial problems in the intensive care unit were
23 noted to be hyponatremia, respiratory failure, renal laceration, retroperitoneal hematoma,
24 hypomagnesemia, hypocalcemia, metabolic acidosis, acute anemia of blood loss, bigeminy,
25 cerebral edema, and acute renal failure.

26 On January 29, 2016, Ms. Brooks developed abdominal compartment syndrome and was
27 taken to the operating room where she underwent an emergency decompression laparotomy. She
28 was having a significant amount of bleeding from her left renal laceration and required an

1 emergency left nephrectomy (removal of the kidney) as well as left adrenalectomy due to
2 hemorrhages to the left adrenal gland as well. The procedure lasted until the early morning
3 hours of January 30th. During that operation, she also underwent removal of the previously
4 placed left ureteral stent and enterolysis removal of previously placed ventral incisional hernia
5 mesh in order to be able to enter her abdomen and placement of vacuum-assisted dressing for her
6 abdominal compartment syndrome.

7 Ms. Brooks was transferred to the intensive care unit in critical condition. In the early
8 morning hours of January 30, it was also necessary to place a catheter for emergency dialysis.
9 On January 31, Ms. Brooks continued to remain critically ill. Her bladder pressures were
10 carefully followed and she did not have any further evidence of abdominal compartment
11 syndrome. However, she did suffer from hyponatremia, thrombocytopenia, neurologic changes
12 from cerebral edema, severe protein calorie malnutrition, acute anemia of blood loss, abnormal
13 liver function tests presumably from shock liver, and respiratory failure.

14 On February 1, 2016, Ms. Brooks was taken back to the operating room for planned re-
15 opening of her recent laparotomy for washout of the abdomen. During her initial decompressive
16 laparotomy, three surgical packs had been placed in the left upper quadrant for control of
17 ongoing bleeding. The packs were removed without recurrence of bleeding. She was closed and
18 taken back to the intensive care unit.

19 Ms. Brooks continued to have respiratory failure and on the next day was again noted to
20 be hypokalemic and hypocalcemic. She continued to have neurologic changes. She began to
21 gradually respond to stimulants and opened her eyes spontaneously. Later in the hospital course,
22 she began to follow some commands and began to move all four extremities. From February 2
23 to February 6 she experienced ongoing respiratory failure, ongoing renal failure, continued
24 severe protein-calorie malnutrition for which she had been started on early enteral feeds.

25 Ms. Brooks continued to have intermittent electrolyte disorders with hypokalemia and
26 hypomagnesemia, although her hyponatremia resolved after the initial correction. On February
27 5, she was noted to have right upper lobe lung collapse on her chest x-ray for which a
28 bronchoscopy was performed. She had also had right upper lobe lung collapse after her initial

1 procedure and a bronchoscopy had been performed at that time. On February 7, she was noted to
2 have diarrhea and a C. difficile toxin was positive. She was started on Flagyl.

Throughout her hospital course, Ms. Brooks continued to have diarrhea, but it was not
as severe as when she was first admitted. On February 8 and February 10, she

1 Ms. Brooks was on the waiting list to transfer to CPMC when she was taken emergently
2 to the operating room for abdominal compartment syndrome. While in the operating room in the
3 early morning hours of January 30, CPMC called and said that they had a bed available;
4 however, since Ms. Brooks was undergoing a left emergency nephrectomy and they no longer
5 needed a urologist and no additional treatment could be rendered for her brain edema, it was
6 decided to keep her at TRMC.

7 Dr. Gao of CPMC recommended that Ms. Brooks be transferred emergently to the nearest
8 stroke facility that could care for her. Thereafter, Community Regional Medical Center
9 ("CRMC") was contacted and accepted her in transfer. The patient was then emergently
10 transferred to CRMC.

11 III. LAW AND ARGUMENT

12 A. **Summary Judgment Is Properly Granted Where No Triable Issue Exists As To Any** 13 **Material Fact And The Defendant Is Entitled to Judgment As A Matter Of Law.**

14 The law applicable to motions for summary judgment and the purpose of such motions is
15 well known to this Court and will not be belabored here. Defendant brings its motion pursuant to
16 Code of Civ. Procedure § 437c. A court shall not deny summary judgment based on the
17 opposing party's hope or speculation that some evidence may develop in the future to create a
18 triable issue of fact between the parties. If Defendant is entitled to summary judgment based on
19 their proof, Plaintiffs can only overcome the summary judgment by introducing competent
20 evidence to create a triable issue of material fact. (*Luders v. Pummer* (1957) 152
21 Cal.App.2d276, 279-280.)

22 For purposes of summary judgment, Defendant has met its burden of proof that Ms.
23 Brooks' medical malpractice cause of action has no merit by showing that one or more elements
24 of the action, even if not separately pled, cannot be established. (Code Civ. Proc. §437c(o)(1).)
25 Specifically, for purposes of this motion, Defendant has established through the expert witness
26 Declarations of Dr. Comiter, Nurse Pitts, and Dr. Leeson that TRMC met the applicable standard
27 of care in and there is nothing in the medical records that indicated that any of the nurses or non-
28 physician staff at TRMC violated the applicable standard of care, and Dr. Leeson has also

1 offered the key expert opinion that TRMC did not violate the standard of care by providing
2 privileges to Dr. Fightlin. Ms. Brooks must now show that a triable issue of one or more
3 material facts exists as to her cause of action. (*Id.*) She may not rely upon the mere allegations
4 in her pleading to show that a triable issue of material facts exists, but rather Ms. Brooks shall set
5 forth the specific facts showing that a triable issue of material fact exists. (*Id.*)

6 Defendant moves for summary judgment as to the entirety of Plaintiffs' Complaint.
7 Defendant brings this dispositive motion on the grounds that Plaintiffs cannot as a matter of law
8 establish a breach of duty by Defendant in this case. A breach of duty is a required element of
9 the first cause of action in Plaintiff's Complaint. (Judicial Council of California Civil Jury
10 Instructions ("CACI") (2016) Nos. 400, 401, 430, and 500.)

11 So also, Defendant has met its burden of proof that Mr. Brooks' loss of consortium claim
12 has no merit. "When a plaintiff has no cause of action in tort, his spouse has no cause of action
13 for loss of consortium." (citations omitted.) (*Blain v. Doctor's Co.* (1990) 222 Cal.App. 3d 1048,
14 1067.)

15 **B. The Declarations Of Dr. Comiter, Nurse Pitts, and Dr. Leeson Provides The**
16 **Requisite Expert Testimony To Support Defendant's Motion.**

17 In this medical negligence action, expert testimony is required to prove or disprove that
18 the defendant performed in accordance with the prevailing standard of care. (*Flowers v.*
19 *Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) When a defendant
20 moves for summary judgment and supports the motion with expert testimony that defendant's
21 conduct fell within the standard of care, the defendant is entitled to summary judgment unless the
22 plaintiff comes forward with conflicting expert evidence. (*Munro v. The Regents of the*
23 *University of California* (1989) 215 Cal.App.3d 977, 985.)

24 **1. Dr. Comiter, Nurse Pitts, and Dr. Leeson Opined that Defendant TRMC met**
25 **the applicable standard of care, and, therefore, Defendant TRMC is entitled**
26 **to Summary Judgment**

27 To recover in an action for medical negligence, the plaintiffs must establish that the
28 defendant's care and treatment fell below the "standard of care." That standard is met when a
physician or surgeon exercises, in diagnoses and treatment, that reasonable degree of skill,

1 knowledge and care ordinarily possessed and exercised by members of the medical profession
2 under similar circumstances. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081;
3 *Bardessono v. Michels* (1970) 3 Cal.3d 780, 788)

4 “The standard of care against which the acts of a physician are to be measured is a
5 matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice
6 action and can only be proved by their testimony....” (*Flowers v. Torrance Memorial Hospital*
7 *Medical Center* (1994) 8 Cal.4th 992, 1001 [internal citations omitted]; see also, *Lawless v.*
8 *Calaway* (1944) 24 Cal.2d 81, 90) Expert testimony is required to prove that Defendant’s
9 actions fell below the standard of care because the facts of the case, i.e., medical diagnosis, care
10 and treatment are not within the common knowledge of a layperson. (*Jambazian v. Borden*
11 (1994) 25 Cal.App.4th 836, 844)

12 When expert testimony is required to establish a relevant issue in a malpractice claim, an
13 expert’s declaration that the defendant adhered to the standard of care is proper evidence.

14 California courts have recognized this principle, stating:

15 “California courts have incorporated the expert evidence requirement into their standard
16 for summary judgment in medical malpractice cases. When a defendant moves for summary
17 judgment and supports his motion with expert declarations that his conduct fell within the
18 community standard of care, he is entitled to summary judgment unless the plaintiff comes
19 forward with conflicting expert evidence.” (*Munro v. Regents of University of California* (1989)
20 215 Cal.App.3d 977, 984-985 [internal citations omitted])

21 Submitted with this Motion for Summary Judgment is the declaration of Craig V.
22 Comiter, M.D. Dr. Comiter is a highly qualified urologist. He is licensed to practice medicine in
23 the State of California and is Board Certified in Urology. Dr. Comiter is Professor in the
24 Department of Urology and a Professor (Courtesy) in the Department of Obstetrics and
25 Gynecology at Stanford University Medical Center. Dr. Comiter is the Director of the
26 Fellowship in Female Pelvic Medicine and Reconstructive Surgery at Stanford. Dr. Comiter has
27 been actively engaged in the practice of medicine for twenty-five years, specifically in the
28 practice of urology for over twenty years.

1 Based on his education, training and professional experience, coupled with his review
2 and professional analysis of Ms. Brooks' pertinent medical records and imaging studies, Dr.
3 Comiter is familiar with the standard of care required that apply now, and that were applicable
4 when Ms. Brooks was admitted to TRMC in January 2015. Dr. Comiter is qualified to render
5 expert opinions as to whether the nurses and non-physician staff of TRMC met the applicable
6 standard of care. [SUMF No. 3] The factual and medical bases for Dr. Comiter's opinions are
7 set forth in detail in his Declaration. Dr. Comiter opined as follows:

8 (a) Based on my medical education, training, and professional experience, as well
9 as my review of Ms. Brook's medical records, it is my professional opinion that
10 the non-physician staff of TRMC who treated Ms. Brooks at TRMC from January
11 28, 2016 to February 12, 2016, met the applicable standard of care. There is
12 nothing in the medical records that indicates that any of the nurses or non-
13 physician staff at TRMC violated the applicable standard of care. [SUMF No. 20];
14 Based on her education, training and professional experience, coupled with her review
15 and professional analysis of Ms. Brooks' pertinent medical records and imaging studies, Nurse
16 Pitts is familiar with the standard of care required that apply now, and that were applicable when
17 Ms. Brooks was admitted to TRMC in January 2015. Nurse Pitts is qualified to render expert
18 opinions as to whether the nurses and non-physician staff of TRMC met the applicable standard
19 of care. [SUMF No. 4] The factual and medical bases for Nurse Pitts' opinions are set forth in
20 detail in her Declaration. Nurse Pitts opined as follows:

21 (a) Based on my medical education, training, and professional experience, as well as
22 my review of Ms. Brooks' medical records, it is my professional opinion that the non-
23 physician staff of TRMC who treated Ms. Brooks at TRMC from January 28, 2016 to
24 February 12, 2016, met the applicable standard of care. There is nothing in the
25 medical records that indicates that any of the nurses or non-physician staff at TRMC
26 violated the applicable standard of care. [SUMF No. 22].

27 As to Plaintiffs' allegation Defendant TRMC "was negligent in granting staffing
28 privileges to Richard Fightlin, M.D.," Dr. Leeson found nothing in the applicable policies and

1 procedures to support Plaintiffs' allegations. Based upon Dr. Leeson's review of the
2 documents, TRMC did not violate the standard of care by providing privileges to Dr.
3 Fightlin. [SUMF No. 28]

4 Defendant's expert opinions are sufficient to shift the burden of proof under Code of
5 Civ. Proc. §437c(o)(1) and require Plaintiffs to provide competent expert testimony to the
6 contrary. If Plaintiffs fail to provide such contrary expert testimony, summary judgment must be
7 granted in favor of Defendant because it will be undisputed that Defendant TRMC met the
8 applicable standard of care. In the absence of contrary evidence, Plaintiff is unable to prove a
9 breach of duty by Defendant, and his cause of action for medical negligence fails as a matter of
10 law.

11 **2. It is Undisputed that No Act or Omission by the Nurses or Non-Physician**
12 **Staff was a Substantial Factor in Causing Plaintiff's Alleged Harm.**

13 In this case, Plaintiffs must not only prove that Defendant TRMC breached the standard
14 of care, but Plaintiff must also prove that TRMC's breach of the standard of care was a
15 substantial factor in causing Plaintiff's harm. (*Mayes v. Bryan* (2006) 139 Cal.App. 4th
16 1075, 1093; CACI VF-500 at ¶ 2.) Causation is proven when a plaintiff produces sufficient
17 evidence to allow the jury to infer that in the absence of the defendant's negligence, there was a
18 reasonable medical probability Plaintiff would have obtained a better result. (*Id.*)

19 To establish causation in a medical malpractice case, an expert's opinion must establish
20 more than a 50% connection between the alleged breach of the standard of care and Plaintiff's
21 harm. (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 123.) The law is settled that causation
22 must be proven within a reasonable medical probability based on competent expert testimony.
23 (*Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1489.) The courts have fashioned the critical
24 distinction between a "medical probability" (the correct standard) and a "medical possibility" (an
25 incorrect standard.) (*Simmons v. West Covina* (1989) 212 Cal.App.3d 696, 702.) A possible
26 cause only becomes probable when, in the absence of other reasonable causal explanations, it is
27 more likely than not that plaintiff's injury was a result of the action. (*Jones v. Ortho*
28 *Pharmaceutical Corporation* (1985) 163 Cal.App.3d 396, 403.)

1 Based on his education, training and professional experience, coupled with his review
2 and professional analysis of Plaintiff's pertinent medical records and imaging studies, Dr.
3 Comiter is qualified to render expert opinions as to whether any act or omission on the part of the
4 nurses or non-physician staff of TRMC was a substantial factor in causing Plaintiff's alleged
5 harm. [SUMF No. 3.] In his Declaration, Dr. Comiter has rendered the following opinion:

6 (a) It is also my medical expert opinion that nothing the nurses and non-physician
7 staff of TRMC did in this case, or failed to do, was a substantial factor in causing
8 the injuries that Plaintiff alleges. [SUMF No. 21.]

9 Based on her education, training and professional experience, coupled with her review
10 and professional analysis of Plaintiff's pertinent medical records and imaging studies, Nurse Pitts
11 is qualified to render expert opinions as to whether any act or omission on the part of the nurses
12 or non-physician staff of TRMC was a substantial factor in causing Plaintiff's alleged harm.
13 [SUMF No. 4.] In her Declaration, Nurse Pitts has rendered the following opinion:

14 (b) It is also my medical expert opinion that nothing the nurses and non-physician
15 staff of TRMC did in this case, or failed to do, was a substantial factor in causing
16 the injuries that Plaintiff alleges. [SUMF No. 23.]

17 Dr. Comiter's and Nurse Pitts' expert Declarations establishes the lack of a causal
18 connection between the care provided by the nurses and non-physician staff of TRMC and
19 Plaintiff's alleged harm. These undisputed material facts warrant the granting of TRMC's
20 motion for summary judgment because Plaintiff must prove the essential element of causation to
21 prevail in this action. She is unable to do so.

22 **3. Plaintiff Steven Brooks' Cause of Action for Negligent Infliction of**
23 **Emotional Distress is Without Merit.**

24 The claim in the Complaint for NIED is based upon a theory of liability to bystanders.
25 Plaintiffs in California may recover under a bystander theory of tort liability for negligent
26 infliction of emotional distress relating the injury or death of close family member. (*Thing v. La*
27 *Chusa* (1989) 48 Cal.3d 644) "In the absence of physical injury or impact to the Plaintiff
28 himself, damages for emotional distress should be recoverable only if the Plaintiff: (1) is closely

1 related to the injury victim, (2) is present at the scene of the injury-producing event at the time it
2 occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers
3 emotional distress beyond that which would be anticipated in a disinterested witness.” (*Id.* at
4 647) NIED does not exist as an independent tort. (See, generally, *Spinks v. Equity Residential*
5 *Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1044-145, citing *Potter v. Firestone Tire*
6 *& Rubber Co.* (1993) 6 Cal.4th 965, 984) It is simply negligence. (*Id.* a 1045)

7 As indicated above, Dr. Comiter and Nurse Pitts have opined that TRMC met the
8 applicable standard of care. To the extent Plaintiffs fail to provide any testimony indicating that
9 the care and treatment witnessed by the Plaintiffs (or the lack of treatment, which was witnessed)
10 breached the standard of care, then Plaintiffs’ cause of action for NIED fails.

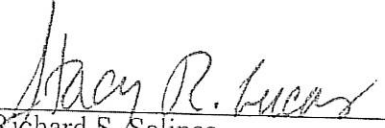
11 IV. CONCLUSION

12 Defendant’s Separate Statement of Undisputed Material Facts and Defendant’s Statement
13 of Evidence, including the exhibits thereto, establish that Defendant met the standard of care in
14 all respects as to any and all aspects of the care provided to Plaintiff Lori Brooks. In addition,
15 Defendant’s Separate Statement of Undisputed Material Fact’s and Defendant’s Statement of
16 Evidence, including the exhibits thereto, establish that nothing defendant did or failed to do was
17 a substantial factor causing injury in this case. Accordingly, Defendant is entitled to summary
18 judgment in its favor as a matter of law as to Plaintiff’s Complaint. For these reasons, Defendant
19 TRMC respectfully requests that this Court grant his Motion for Summary Judgment and enter
20 Judgment in his favor and against Plaintiffs.

21 Dated: June 22, 2017

WEISS · SALINAS LAW GROUP, INC.

22
23 By


Richard S. Salinas

Stacy R. Lucas

Attorneys for Defendant

TULARE LOCAL HEALTH CARE

DISTRICT dba TULARE REGIONAL

MEDICAL CENTER

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27 108464/1002.0096

PROOF OF SERVICE
CCP §§ 1011, 1013, 1013a, 2015.5
FRCP 5(b)

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18 and not a party to the within action; my business address is 7108 North Fresno Street, Suite 250, Fresno, California 93720.

On **June 30, 2017**, I served the document described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT TULARE REGIONAL MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION BY** on the interested party(ies) in this action by placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

☒ BY MAIL: ☐ I deposited such envelope in the mail at Fresno, California. The envelope was mailed with postage thereon fully prepaid.

☒ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Fresno, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ BY FAX TRANSMISSION: I faxed the document(s) to the person(s) at the fax number(s) shown above. The telephone number of the sending facsimile machine was (559) 438-8363. No error was reported by the fax machine that I used.

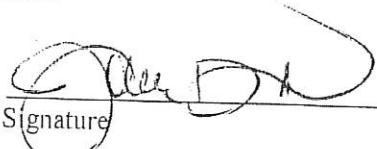
☐ BY PERSONAL SERVICE: I personally delivered such envelope to the offices of the addressee.

☐ BY ELECTRONIC SERVICE: I transmitted electronically by email the above-referenced document to the addressee(s) at the email address shown above.

☐ BY OVERNIGHT COURIER: I enclosed said document in an envelope or package addressed to the person at the address shown above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **June 30, 2017**, at Fresno, California.

JOLENE DEL RIO



Signature

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SERVICE LIST

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103302/1002.0092

EXHIBIT D

FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

OCT 13 2017

STEPHANIE CAMERON, CLERK
BY: _____

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Attorneys for Plaintiffs, LORI M. BROOKS and STEVEN BROOKS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TULARE

LORI M. BROOKS and STEVEN BROOKS,

Plaintiffs,

v.

TULARE LOCAL HEALTH CARE DISTRICT
dba TULARE REGIONAL MEDICAL CENTER;
RICHARD FIGHTLIN, M.D.; ARTHUR WONG,
M.D.; and DOES 1 to 10, inclusive,

Defendants.

CASE NO. VCU266862

PLAINTIFFS' NON-OPPOSITION TO
DEFENDANT, TULARE LOCAL HEALTH
CARE DISTRICT dba TULARE REGIONAL
MEDICAL CENTER'S MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION

Hearing:

Date : October 26, 2017

Time : 8:30 a.m.

Dept. : 2

TRIAL DATE: June 18, 2018

COME NOW, Plaintiffs, LORI M. BROOKS and STEVEN BROOKS, who, in exchange for a
waiver of costs, do not oppose Defendant, TULARE LOCAL HEALTH CARE DISTRICT dba
TULARE REGIONAL MEDICAL CENTER'S Motion for Summary Judgment scheduled for hearing
on October 26, 2017.

DATED: October 11, 2017

BARADAT & PABOOJIAN, INC.

By: _____

Kevin Talajian
DANIEL R. BARADAT
Attorney for Plaintiffs,
LORI M. BROOKS and
STEVEN BROOKS

PLAINTIFFS' NON-OPPOSITION TO DEFENDANT, TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL
MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

PROOF OF SERVICE

My business address is 720 W. Alluvial Avenue, Fresno, California 93711. I am employed in Fresno County, California. I am over the age of 18 years and am not a party to this case.

On the date indicated below, I served the foregoing document(s) described as **PLAINTIFFS' NON-OPPOSITION TO DEFENDANT, TULARE LOCAL HEALTH CARE DISTRICT dba TULARE REGIONAL MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Richard S. Salinas
WEISS SALINAS LAW GROUP, INC.
7108 North Fresno Street, Suite 250
Fresno, California 93720
Telephone: (559) 438-2080
Facsimile: (559) 438-8363

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HEALTH CARE DISTRICT dba TULARE
REGIONAL MEDICAL CENTER

Jerry D. Casheros
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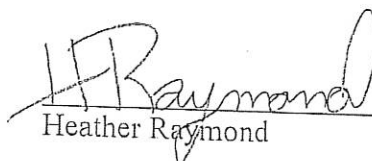
Attorney for Defendant,
RICHARD FIGHTLIN, M.D.

XX (BY MAIL) I am readily familiar with the business' practice for collection and processing of correspondence for mailing, and that correspondence, with postage thereon fully prepaid, will be deposited with the United States Postal Service on the date noted below in the ordinary course of business, at Fresno, California.

XX (BY FACSIMILE) I transmitted such document(s) to the addressee(s) at the facsimile number(s) listed above.

EXECUTED ON October 11, 2017, at Fresno, California.

XX (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Heather Raymond